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2010

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### Recommended Citation

Rasdan, Afsheen John, "Bush and Obama Fight Terrorists Outside Justice Jackson's Twilight Zone" (2010). *Constitutional Commentary*. 41.  
<https://scholarship.law.umn.edu/concomm/41>

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# BUSH AND OBAMA FIGHT TERRORISTS OUTSIDE JUSTICE JACKSON'S TWILIGHT ZONE

*Afsheen John Radsan\**

George W. Bush and Barack H. Obama have used presidential powers in different ways. That is easy to say because they have occupied the Oval Office at different times. Since the fourth dimension of time affects the three dimensions of space, the signing of the same executive order is *not* the same act. Beyond that, parsing specific differences between Presidents is difficult.

To explain the differences between Bush and Obama, one might use metaphor, formulas, facts, or some combination. One metaphor is to compare American Presidents to Odysseus from Greek legend. One formula comes from Justice Jackson's famous concurrence in the Steel Seizure Case. And one set of facts relates to programs that involve the Central Intelligence Agency.

Traveling from the abstract to the granular, my essay tries to show that the gap in national security practices between Bush's second year in office and his last year is far wider than the gap between Bush's last year in office and Obama's first year. (The shift between Bush I and Bush II is thus more radical than the shift between Bush II and Obama I.) As to the use of Predator strikes, irregular renditions, military commissions, the state-secrets privilege, and a label from armed conflict that allows long-term detention of suspected terrorists, there has been surprising continuity between presidential administrations. Obama has changed the packaging of aggressive programs more than their contents.

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\* Professor, William Mitchell College of Law. He thanks Benjamin Canine, Knapp Fitzsimmons and Brian Schenk for their research assistance.

## THE METAPHOR

Homer can help explain Bush and Obama. In epic poetry, Homer presented a strategy for dealing with beasts that caused sailors to crash into rocks by the lure of sweet song.<sup>1</sup> Odysseus, following Circe's advice, ordered his crew to plug their ears with wax and to tie him to the mast of their ship. By limiting themselves in a minor way, by giving up some power, they hoped to prevent themselves from being captured by Sirens. The limitations, so they believed, led to their greater good. Odysseus, rather than face Sirens on his own, sought assistance from his crew. There was safety in numbers.

To apply Homer, one might compare how willing President Bush was and how willing President Obama is to ask Congress, the other elected branch, to limit presidential power. To what extent do the two Presidents retreat from a full assertion of inherent powers? No matter their political parties, all Presidents seem to agree that there are some executive powers which do not permit intrusion from Congress. Presidents Bush and Obama, in this regard, have something in common. Congress, they must be sure, cannot legislate away the President's powers to pardon offenders or to veto legislation. Those are two easy examples.

Most observers agree that the core of presidential power cannot be molested. Yet profound differences emerge when general statements are applied at a more specific level. For each President, one might ask how large that impenetrable core of executive power really is. John Yoo, a former official in the Bush Justice Department, offered one description. As for the CIA's aggressive interrogations, Yoo said:

Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.<sup>2</sup>

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1. HOMER, *THE ODYSSEY* 148–53 (Robert Squillance ed., George H. Palmer trans., Barnes & Noble Classics 2003).

2. Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *reprinted in* *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 207 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

But John Yoo's description is not within the mainstream.<sup>3</sup> Perhaps he and President Bush pushed things too far. President Obama, for now, is not so pushy. He seems to see a smaller core to presidential power.

Whether presidents agree with Professor Yoo or with his critics, they do not always operate in a single mode. Categories are purer in theory than in fact. Sometimes differences on executive power blur when constitutional principles are adjusted to circumstances beneath the clouds. The reality on the ground, so to speak, has affected two presidents during their journeys in office.

### THE BUSH JOURNEY

During two terms in office, President Bush was not always extreme in his national security practices. On programs that related to the CIA, Bush showed two different faces. His expression in the first term was harsher than in the second.

Right after the 9/11 attacks, President Bush turned to Congress for some support. Congress passed an Authorization for Use of Military Force that encouraged the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."<sup>4</sup> Later, President Bush claimed the AUMF justified several actions in the fight against terrorists.

First, the Bush Administration said the AUMF allowed President Bush to detain an American citizen captured in Afghanistan just after 9/11. A plurality of the court agreed with him in *Hamdi v. Rumsfeld*.<sup>5</sup> Second, Bush's advocates said the

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3. See, e.g., Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2373 (2006) ("[T]he Constitution provides no single source for the President's various abilities to promulgate agency regulations, to exercise prosecutorial discretion, and to conduct foreign relations."); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why it Matters*, 88 B.U. L. REV. 505, 521 (2008) (arguing, *inter alia*, that executive branch precedents should not be seen as conclusive or even necessarily persuasive in establishing constitutionality and that executive power can be curbed by reforms that minimize secrecy and impose more accountability); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) ("[T]he Founders assumed that massive changes to the status quo required legislative enactments, not executive decrees. As that concept has broken down, the risks of unchecked executive power have grown to the point where dispatch has become a worn-out excuse for capricious activity.").

4. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).

5. See 542 U.S. 507, 508 (2004) (plurality opinion) (holding that President had the

AUMF authorized the military commissions President Bush established by executive order in Guantanamo. The Supreme Court disagreed in *Hamdan v. Rumsfeld*.<sup>6</sup> Third, the Bush Administration said the AUMF justified the terrorist surveillance program, that is, the monitoring of communications without seeking warrants through the Foreign Intelligence Surveillance Act.<sup>7</sup> This controversy did not reach the Supreme Court. Instead, the TSP controversy was settled through statutory amendments that, among other things, immunized telecommunications companies that assisted government surveillance.<sup>8</sup>

Soon after 9/11, Congress also passed the Patriot Act<sup>9</sup> as a sort of presidential wish list. As a result, it lowered the wall to cooperation between law enforcement and intelligence gathering. Congress allowed financial and other information to be collected by national security letters—basically administrative subpoenas. And it approved sneak and peek warrants.

Many Bush officials said robust executive power was necessary to fight terrorists. Their common goal was power, but they disagreed on how to obtain that power as 9/11 faded into the country's past. One group believed President Bush should rely on his Article II powers, alone, flexing the Commander-in-Chief Clause among other provisions. Another group believed President Bush should seek more congressional support. Mindful of Justice Jackson's famous categories from the *Steel Seizure Case*, this group reminded the extremists that the President's power is at its maximum when Article II powers are combined with everything Congress can delegate under Article I. For them, this was better politics as much as it was a better legal framework. They tried to shift the question from whether the President had the power to do something to whether the Federal Government did. Not all officials, of course, neatly fell into two

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right to detain, but subject to "a meaningful opportunity to contest the factual basis for that detention").

6. See 548 U.S. 557 (2006).

7. Memorandum from the U.S. Dep't of Justice on Legal Authorities Supporting the Activities of the Nat'l Sec. Agency Described by the President 3 (Jan. 19, 2006), available at <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf> ("Accordingly, electronic surveillance conducted by the President pursuant to the AUMF, including the NSA activities, is fully consistent with FISA and falls within category I of Justice Jackson's framework.").

8. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 102(a), 122 Stat. 2436, 2459 (codified as amended at 50 U.S.C. §§ 1812, 1881, 1881g, 1885, 1885c (2008)).

9. Pub. L. No. 107-56, 115 Stat. 272 (2001).

groups. But for the sake of illustration, I propose David Addington as a representative for the first group and Jack Goldsmith for the second group.

Addington was Vice President Cheney's legal adviser, and later became Cheney's chief of staff. Addington's tenure with the Bush Administration is often attributed to extending executive power to unprecedented levels.<sup>10</sup> Under Addington, the Bush Administration was hostile to Congress and largely unconcerned with the Supreme Court.<sup>11</sup> Addington himself was quoted as saying, "[w]e're going to push and push and push until some larger force makes us stop."<sup>12</sup>

Goldsmith was the head of the Justice Department's Office of Legal Counsel for part of 2004. Opposed to Addington, Goldsmith advocated congressional approval of controversial executive actions. He called for Congress's "explicit help" on detentions and military commissions.<sup>13</sup> Goldsmith rooted his beliefs in Justice Jackson's articulation of executive power being "at its maximum" when the President acts "pursuant to an express or implied authorization of Congress."<sup>14</sup> Goldsmith saw congressional approval as necessary for placing counterterrorism policies "on a solid legal foundation."<sup>15</sup>

From 2002 until 2006, the Bush Administration did not seek much from Congress or many adjustments in statutes. Letting things be, the Administration did not get close to a framework statute to cover the details in the fight against terrorists: detention, interrogation, transfers, and trials. For a while, Addington prevailed.

Once the country's mood changed, the courts entered the breach. *Hamdan*, concerning the legality of military commissions at Guantanamo, was a clear setback for Addington and a vindication for Goldsmith. The Supreme Court held that commissions, established on nothing more than the President's

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10. See Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. REV. 341, 343–46 (2008) (describing the debate over the "Unitary Executive" theory and the Bush Administration's post-9/11 expansion of Presidential authority).

11. JACK GOLDSMITH, *THE TERROR PRESIDENCY* 126 (2007) (describing Addington's belief that presidential power was coextensive with presidential responsibility).

12. *Id.*

13. *Id.* at 123.

14. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

15. GOLDSMITH, *supra* note 11, at 123.

November 13, 2001 order, violated the Uniform Code of Military Justice and, by the UCMJ's link to the laws of armed conflict, also violated Common Article 3 of the Geneva Conventions.<sup>16</sup> It took the Hamdan setback in 2006 to cause the White House to go back to Congress with hat in hand. As a result, the Military Commissions Act was passed in October 2006.<sup>17</sup> Curiously, Obama, as a Senator, voted against this grant of power to President Bush.<sup>18</sup> The MCA was a partial framework statute, covering military trials and interrogation standards. Goldsmith, gone from the government, prevailed. The War Crimes statute was retroactively amended to only include "grave breaches" of Common Article 3 of the Geneva Conventions. And the President, in a CIA exception, was given the leeway to approve interrogation tactics below torture but beyond what was permitted to the Department of Defense and the Federal Bureau of Investigation. These tactics were outlined in Executive Order 13,440, issued on July 20, 2007 as well as the classified supplement to the executive order.<sup>19</sup>

After that, an impatient Bush counted his final days in office as the country looked forward to the presidential transition. Easily drawn into the power of positive thinking, many people started to join the chant of "Yes, we can." Already in place for them, whether they acknowledged it or not, were some reasonable programs at the CIA.

### THE OBAMA JOURNEY

To differ from Bush's journey in significant terms, Obama could have insisted on transparency and accountability from the CIA and the rest of the intelligence community. Obama could have steered away from the laws of armed conflict and abbreviated process; to please civil libertarians in his coalition,

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16. *Hamdan*, 548 U.S. at 613 ("The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations,' including, *inter alia*, the four Geneva Conventions signed in 1949. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.") (citations omitted).

17. Military Commissions Act of 2006, Pub L. No. 109-366, 120 Stat. 2600 (2006).

18. 109 CONG. REC. S10,388 (2006), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2006\\_record&page=S10388&position=all](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2006_record&page=S10388&position=all) ("Let me take a few minutes to speak more broadly about the bill before [the Senate] . . . . The problem with this bill is not that it is too tough on terrorists. The problem with this bill is that it is sloppy. And the reason it is sloppy is because we rushed it to serve political purposes instead of taking the time to do the job right.").

19. Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (Jul. 20, 2007).

he could have moved toward the criminal justice system and full due process for handling suspected terrorists. But, so far under Obama, a major shift on CIA programs has not occurred.

Less than two years into Obama's first term, there is not as much to report about his executive actions. National security is not at the top of his agenda since the financial bailout and health-care reform have taken up the new administration's time. On CIA-related policies, President Obama has not made much progress on a framework statute. And he has talked less than President Bush about an executive override of statutes, whether in presidential signing statements or in other places. As one shot over the CIA's deck, however, he did allow Attorney General Eric Holder to reopen a criminal investigation about alleged abuses that occurred in the CIA's detention and interrogation program during the Bush Administration.

For Obama, the Military Commissions Act (in an updated version in 2009) stands as his compass on national security.<sup>20</sup> Even so, Captain Obama cleared out a few things that Captain Bush had left on deck. On January 22, 2009, Obama closed the CIA's secret prisons, eliminated the CIA exception for interrogations, and imposed a uniform interrogation standard across the government.<sup>21</sup> Yet he did these things by executive order rather than by statute. So if Obama changes his mind about secret prisons and the uniform standard, he does not need Congress's permission. He could make those changes in the stroke of a pen, a possibility hinted at in the executive order which states that Obama's Special Task Force, "if warranted," should "recommend any additional or different guidance for other departments or agencies."<sup>22</sup>

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20. See Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801–1807, 123 Stat. 2574 (2009), available at <http://www.defense.gov/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf>; Warren Richey, *Obama Endorses Military Commissions for Guantanamo Detainees*, CHRISTIAN SCIENCE MONITOR, Oct. 29, 2009, available at <http://www.csmonitor.com/USA/Justice/2009/1029/p02s01-usju.html> ("In signing the National Defense Authorization Act on Wednesday, President Obama has personally endorsed yet another attempt by the US government to conduct military-commission trials of terror suspects currently held at the Guantánamo detention camp.").

21. Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009).

22. Press Release, U.S. Dep't of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009), available at <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html> ("The Executive Order directed the Task Force to study and evaluate 'whether the interrogation practices and techniques in Army Field Manual 2-22.3, when employed by departments and agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies.'").



If Obama is duplicitous, he could keep any renewal of secret prisons and aggressive interrogations hidden from those without a “need to know.” He might argue to himself (and to an inner core of advisers with security clearances) that it would hurt national security—by undercutting support both at home and abroad—if everyone knew the dirty truth of what is done for security. Quite charming, Obama may be better than Bush in hiding truth from the country. However Captain Obama steers the ship of state, the winds behind him will be strong when he combines executive prerogative with the presidential power to classify information.

If President Obama were truly interested in the fundamentals of the country’s counterterrorism policies—things that would last longer than one or two presidential terms—he would try to lock changes into place by statute. As President, he could propose new legislation. Undoing statutes, of course, would require majority votes in Congress plus the President’s signature, or two-thirds votes from both houses of Congress to override a presidential veto. To be more of an Odysseus, President Obama should seek more statutes. At this stage in his journey, the current binds do not tie him very tightly—if at all.

On two different journeys, the Military Commissions Act strapped both President Bush and President Obama. Bush, who resisted Congress during the middle years of his presidency, did not seem as happy to be strapped to the ship as Obama does. Looks, of course, can be deceiving. President Obama’s smile may mask duplicity on the CIA’s business of espionage and covert action. How much you like that duplicity depends on the extent you believe secrecy and democracy can co-exist.

### THE FORMULA

The facts about executive power require context to be meaningful. For additional insights into Bush and Obama, one might look back to the canon of United States Supreme Court cases. In the *Steel Seizure Case*,<sup>23</sup> Justice Jackson acknowledged the lack of useful models “to concrete problems of executive power as they actually present themselves.”<sup>24</sup> Instead of offering an analogy to ancient Greece, Jackson drew on the Old Testament, saying that the answers to executive power “must be

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23. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring).

24. *Id.* at 634.

divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”<sup>25</sup> Other than that, Jackson suggested that the authorities on executive power, over the course of history, have cancelled themselves out. In place of metaphor (or as another metaphor), Jackson offered his three famous categories. Category one is when the President has express or implied consent from Congress. Category three is when Congress has expressed or implied its disagreement with the President. And category two is when Congress is poised between categories one and three. Since then, courts and scholars are more likely to use Jackson’s categories than to apply analogies from ancient Greece, the Old Testament—or from some other source.

Even when courts are not explicit about the Jackson categories, commentators use them to come back to cases about executive power. John Roberts, for example, stated during his confirmation hearings to become Chief Justice that the Jackson formula is best for solving problems about executive power. In response to Senator Feingold’s question about how Roberts would have analyzed the President’s authority to detain a United States citizen as an enemy combatant (an issue earlier before the Court in *Hamdi*), Roberts replied: “My understanding of the appropriate approach in this area is that it is the *Youngstown* analysis, the one sent forth in Justice Jackson’s concurring opinion. And I think that is the most appropriate way to flesh out the issues.”<sup>26</sup> The *Hamdi* decision, however, showed that Supreme Court Justices were less explicit about the *Steel Seizure Case* than the nominee about to join them as Chief Justice.

Other lawyers have also forgotten Jackson’s categories. One of the many criticisms leveled against John Yoo’s analysis of the legality of CIA interrogations was his failure to mention

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25. *Id.*

26. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 243 (2005), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:23539.wais.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:23539.wais.pdf). Similarly, in response to Senator Leahy’s inquiry as to whether the President could override a congressional ban on torture, Roberts stated: “there often arise issues where there’s a conflict between the Legislature and the Executive over an exercise of Executive authority – asserted Executive authority. The framework for analyzing that is in the *Youngstown Sheet and Tube* case, the famous case coming out of President Truman’s seizure of the steel mills.” *Id.* at 152. When Leahy asked if *Youngstown* is settled law, Roberts responded, “I think the approach in the case is one that has guided the court in this area since 1954 or 1952, whatever it was . . . *Youngstown* is a very important case in a number of respects.” *Id.* at 153. Roberts went on to state that Justice Jackson is one of the Justices he most admires. *Id.*

Jackson's categories.<sup>27</sup> To many, Yoo had committed heresy. Only a former or current law professor, it seems, would be stupid enough or brave enough to disagree with the Chief Justice about Jackson's importance.

It is not clear whether Yoo forgot the Jackson categories or chose not to apply them in his work for the Office of Legal Counsel. Either way, to the extent Yoo challenges the usefulness of these simple categories, I join him in heresy. To me, the Jackson categories tend toward meaninglessness. The twilight zone, albeit a nice title for a television program, is not so distinct from categories one and three, and the poor threads to the categories clash with the rich tapestry of American constitutional law.

#### JACKSON APPLIED IN *HAMDI*

To analyze executive power under Bush and Obama, three categories may be more than necessary to the judiciary's binary decisions on whether or not a President can take certain actions. Because courts do not usually declare a tie between the parties to a dispute, Jackson's categories are too complicated. At the same time, because three categories may not be enough to explain all the nuances to the Constitution, Jackson's categories are too simplistic. Whether the categories prove too much or too little, judges and academics seem to indulge the Jackson categories for old time's sake.

For judges, interpreting whether a statute helps or hurts the President is often very difficult. In *Hamdi*, the *Steel Seizure Case* was a looming presence. Justice O'Connor, for example, believed the AUMF helped President Bush and satisfied the Non-Detention Act:

[I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and

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27. Harold Hongju Koh, Dean of Yale Law School, Statement Before the Senate Judiciary Comm. regarding the Nomination of the Hon. Alberto R. Gonzales as Att'y Gen. of the U.S. 4,7 (Jan. 7, 2005), available at <http://www.law.yale.edu/documents/pdf/KohTestimony.pdf>. ("Nevertheless, in my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read. . . . In a stunning failure of lawyerly craft, the August 1, 2002 OLC Memorandum nowhere mentions the landmark Supreme Court decision in *Youngstown Steel & Tube Co. v. Sawyer*, where Justice Jackson's concurrence spelled out clear limits on the President's constitutional powers.").

appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.<sup>28</sup>

Justice Souter, by contrast in the same case, did not believe the AUMF was specific enough to serve as an Act of Congress to displace the NDA. For multiple reasons, Souter read the NDA "to require clear congressional authorization before any citizen can be placed in a cell."<sup>29</sup> Souter stated:

[The] focus [of the AUMF] is clear, and that is on the use of military power. It is fairly read to authorize the use of armies and weapons, whether against other armies or individual terrorists. But . . . it never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit.<sup>30</sup>

Yes, the Jackson categories do help explain the difference between Justice O'Connor and Justice Souter in one case. Their debate in *Hamdi*, after all, can be reduced to a debate between two of the three Jackson categories. Justice O'Connor, who said the AUMF satisfied the requirement for congressional action in the NDA, put President Bush in category one. Justice Souter, on the other hand, said the AUMF was not specific enough to satisfy the NDA, putting President Bush in category three. Yet neither Justice O'Connor nor Justice Souter was explicit about the Jackson category she or he applied.

None of the Justices in *Hamdi*, however, placed the case in category two. Category two, in *Hamdi* or in other cases, is not so useful. It draws snickers from students. It reminds some of Johnny Cash's song about walking the line. And movie buffs connect the category to Marlon Brando's character in *Apocalypse Now* who dreamed to see a snail slither on the blade of a straight-edge razor—and survive. For many, Jackson's second category is not much more than colorful verbiage.

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28. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

29. *Id.* at 543.

30. *Id.* at 547. Although Justice Souter did not believe the Court needed to go beyond the statutory language of the NDA and AUMF, he stated that Justice Jackson's Youngstown concurrence was "instructive," noting that "Presidential authority is 'at its lowest ebb' where the President acts contrary to congressional will." *Id.* at 552 (quoting *Youngstown*, 343 U.S. at 636–38).

## MY TAKE ON THE CATEGORIES

Judges and academics who use the Jackson categories tend to pass over the finer points Justice Jackson himself made clear. If President Bush or Obama is in category one, with express or implied authorization from Congress, that does not mean he always wins. Some actions are not permitted to the Federal Government. Judges, when “justiciable” controversies reach the court, must tell us which ones. Similarly, the President does not always lose in category three. There, his power is at its lowest ebb, but, as John Yoo hinted in his OLC memorandum, judges (and Presidents Bush and Obama) must tell us when Congress has gone too far.

Jackson’s intermediate category, in which it is not clear whether Congress is for Bush or against Obama, is of little use to courts in deciding cases about executive power. The decision about executive power, no matter the facts to the case or controversy, turns out to be binary for the courts: either the executive action is sustained or it is overruled. An equipoise in which Congress is neither for the President nor against him has theoretical importance (and perhaps academic importance), but it is not where cases are decided in the real world. Principled judges may work up through the categories to reach a result, category one for the President or category three against him. Or results-oriented judges, whether or not they are transparent in their written opinions, may back their decisions into the categories.

Justice Stevens, in his *Hamdan* opinion, gives short shrift to the important point that the President does not always lose in category three. About all he has to say on this point is contained in a short footnote: “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own powers, placed on his powers.”<sup>31</sup> Justice Stevens, of course, stacks the deck in his favor by assuming a “proper exercise” of congressional power.<sup>32</sup> For this conclusion, he cites the *Steel Seizure Case* and then springs a trap from *Hamdan*’s oral argument: “The Government

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31. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (citing *Youngstown*, 343 U.S. at 637).

32. *Id.*

does not argue otherwise.”<sup>33</sup> But this is what the government’s counsel actually said:

Congress has repeatedly recognized and sanctioned [the authority of the executive branch to try enemy combatants by military commissions]. Indeed, each time Congress has extended the jurisdiction of the court-martials [sic], Congress was at pains to emphasize that that extension did not come in derogation of the jurisdiction of military commissions. And in its most recent action, Congress clearly did not operate as somebody who viewed the military commissions as *ultra vires*. They offered no immediate review, and no review at all for charges resulting in a conviction of less than 10 years.<sup>34</sup>

That does not mean Congress could have done anything it wanted in the UCMJ. There are some constitutional limits on congressional action. Whether for John Yoo or Justice Stevens, for George Bush or Barack Obama, there must be some areas of presidential power onto which Congress may not intrude. This, to repeat, is an initial premise to my essay.

Back to my focus on the CIA, not only do I question the usefulness of Jackson’s categories on issues of executive power, I challenge whether Congress is a significant check on intelligence activities.<sup>35</sup> More promising as checks on the intelligence community are the patrolling entities within the executive branch: the lawyers, the inspectors general, and the review boards within the clandestine service. Internal checks, in other words, are more effective than external checks on the CIA’s manifestations of executive power. Congress’s express or implied approval of intelligence activities, whether by appropriations or by more specific statutes, is superficial compared to deeper trends within the executive branch. In a sort of paradox, however, the most important checks are the most difficult to measure; empirical data on the CIA’s Office of General Counsel, the Office of Inspector General, and the Accountability Review Boards are thin—and often classified. This paradox applies to both Presidents Bush and Obama.

So while Congress is not irrelevant, the importance of the congressional variable should not be overstated in the presidential formula. An academic’s familiarity with the Jackson categories does not make them always relevant to reality.

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33. *Id.*

34. Transcript of Oral Argument at 35, *Hamdan*, 548 U.S. 557 (2006) (No. 05–184).

35. See A. John Radsan, *Sed Quis Custodiet Ipsos Custodes: The CIA’s Office of General Counsel?*, 2 J. NAT’L SECURITY L. & POL’Y 201 (2008).

Internal checks are much more important than the Jackson categories in understanding how Presidents Bush and Obama ensure that intelligence activities stay effective and legal.

#### FAVORABLE TAKES ON THE CATEGORIES

Chief Justices are not the only people who find Jackson's categories appropriate for analyzing executive power. The legal academy, for so long, has favored the categories as providing a useful, and to some, an ingenious method for analyzing complicated problems of constitutional law. As Obama (the constitutional law professor turned President) must know, many casebooks on American constitutional law place great emphasis on Jackson's concurrence in *Youngstown*.<sup>36</sup> Not only are the categories imposed on first and second-year law students, many respected scholars flock to the Jackson camp in their writings about executive power. They are unwilling to join the heresy. For various reasons, they relish the Jackson categories. Even so, because it is easy to shun disbelievers, they do not spend too much ink on something taken for granted.

Erwin Chemerinsky, for one, argues that "[t]he Constitution is based on a simple vision of shared and separated powers."<sup>37</sup> At the core of this system are the Constitution's checks and balances. In fact, even "areas of seemingly unilateral executive authority must be understood as part of an overall system of checks and balances."<sup>38</sup> "For almost every major government action," Chemerinsky argues, "at least two branches of government should have to be involved."<sup>39</sup> Chemerinsky believes that, in light of this system of checks and balances, Jackson's categories are appropriate for analyzing the constitutionality of executive actions.<sup>40</sup> Jackson's concurrence is a "[t]raditional

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36. Patricia L. Bellia, *Executive Power in Youngstown's Shadow*, 19 CONST. COMMENT. 87, 88 (2002) (citing, as examples, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 232 (2001); JESSE H. CHOPER, ET AL., THE AMERICAN CONSTITUTION 114 (2001); DANIEL A. FARBER, ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 917 (2d ed. 1997); GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 392 (3d ed. 1996); KATHLEEN M. SULLIVAN AND GERALD GUNTHER, CONSTITUTIONAL LAW 333 (14th ed. 2001)).

37. Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 4 (2006).

38. *Id.* at 5. Chemerinsky describes this approach to government power as "both simplistic and elegant." *Id.*

39. *Id.* at 4.

40. *See id.* at 5–6.

discussion[] of presidential power” that “recognized this basic constitutional framework.”<sup>41</sup>

Chemerinsky, fairer than Justice Stevens, acknowledges that “there are some areas where the Constitution assigns power to only one branch, unchecked by any other.”<sup>42</sup> Jackson’s first category, as Chemerinsky presumes, appropriately addresses these areas. Chemerinsky also recognizes Jackson’s second category, the “zone of twilight” in which the President and Congress may have concurrent, often uncertain authority.<sup>43</sup> And the third category is a “formulation . . . consistent with a system that values shared powers and checks and balances.”<sup>44</sup>

Like Chemerinsky, former Yale Law School Dean Harold Hongju Koh believes Jackson’s framework is appropriate for analyzing our system of checks and balances. Koh, however, is even more enthusiastic than Chemerinsky in praising Jackson:

A number of scholars have posited a theory of the “unitary executive,” the notion that the President has independent power to control the executive branch and to resist infringements upon the prerogatives of his office. But the Constitution provides no single source for the President’s various abilities to promulgate agency regulations, to exercise prosecutorial discretion, and to conduct foreign relations. As Justice Jackson famously wrote in his *Youngstown* concurrence, “Presidential powers are not fixed but fluctuate, depending on their disjunction . . . with those of Congress.” The very point of a constitutional system of checks and balances is to separate and divide powers and to foster internal checks within each branch by recognizing multiple sources of enumerated authority operating in a number of different subject matter areas. The genius of Justice Jackson’s *Youngstown* analysis rests in its acknowledgement of multiple sources of executive power, rather than implying that all executive actions automatically enjoy heightened deference because they spring from a wellspring of a completion power located somewhere in Article II.<sup>45</sup>

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41. *Id.*

42. *Id.* at 4. Chemerinsky mentions the President’s power to pardon. *Id.*

43. *Id.* at 6. Chemerinsky goes on to argue that four approaches may be adopted in analyzing the second category, three of which stress the Constitution’s system of checks and balances. *Id.* Although an interesting endeavor, his examination of the second category is not relevant for our purposes. Suffice to say that Chemerinsky accepts Jackson’s concurrence as an acceptable Constitutional tool.

44. *Id.* at 6.

45. Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2373 (2006).



From a law professor, there may be no higher praise than “genius” to describe an analytic framework. Happy with Jackson, Koh addresses the Supreme Court’s decision in *Hamdan*, concluding that “*Hamdan* proves again that Justice Jackson’s tripartite structure in *Youngstown* is sufficiently flexible to permit robust executive action when Congress genuinely approves, while constraining executive action against the will of Congress.”<sup>46</sup> In simple terms, Koh seemed happy when George W. Bush lost court cases about executive power.

Similar to Koh, Neal Katyal and Laurence Tribe accept Justice Jackson’s “now-canonical categories that guide modern analysis of separation of powers.”<sup>47</sup> Katyal and Tribe explain why Jackson’s categories are appropriate for analyzing the President’s power:

Justice Jackson’s articulation of the constitutional limits upon the commander-in-chief power makes good structural sense: Congress alone can see the problem whole; the Chief Executive tends to be blinded by the single-minded requirements of his military mission, and courts necessarily see but one case at a time and in wartime tend to defer to the executive’s assumed greater knowledge and expertise, coupled with the executive’s electoral legitimacy. For such reasons, the President should not be permitted, simply by donning his military garb, to do in this country what he could never do in merely executive dress.<sup>48</sup>

Of the various presidential powers, Katyal and Tribe seem most concerned with the Commander-in-Chief Clause. For that subset of questions about executive power, they consider the Jackson categories ideal. “In discussing the limits of the President’s power within these three zones,” Katyal and Tribe explain, “Justice Jackson leveled a forceful warning against unilateral assertions of the commander-in-chief power in the name of national security.”<sup>49</sup> They continue:

Justice Jackson read in the Constitution’s text and design, as illuminated by relevant history, a prohibition against giving the President the unilateral power to define such a state of war or to act as though he had. Thus, the President’s commander-in-chief power is not such an absolute as might be

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46. *Id.*

47. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274 (2002).

48. *Id.* at 1275.

49. *Id.* at 1274.

implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. . . . No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.<sup>50</sup>

With an implicit emphasis on Jackson's third category, Katyal and Tribe praise Jackson's framework for illustrating the inherent danger in a President's claim to unbridled power from Commander-in-Chief authority during times of actual or imagined military conflict.<sup>51</sup> Centuries after the Constitution's ratification, they are less concerned about a system that might not give a President—call him Bush or Obama—enough power to protect the nation's security. In so many words, they favor Goldsmith over Addington in the debates that existed during the Bush Administration about executive power. They, too, were happy when a Republican President lost in court.

Not everyone else who embraces the Jackson categories can be named here.<sup>52</sup> Our space is small. Suffice to say that the academics climb over each other in heaping praise on dear Jackson. Repetition makes them all happy.

Besides Jackson's proponents, one can identify a separate group of agnostics who accept Jackson's categories as settled law. In fact, the majority of scholars may actually fall into this

50. *Id.* at 1274–75.

51. In explaining congressional checks on the President's control of military matters, Justice Jackson stated: "There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the 'Government and Regulation of land and naval forces,' by which it may to some unknown extent impinge upon even command functions." *Youngstown*, 343 U.S. at 643–44.

52. See, e.g., Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 410 (2002) ("[T]he concurrence might be the most lucid, straightforward exposition on the remarkable dearth of very clear and useful legal authority which applies to concrete issues that involve executive power as the questions manifest themselves in practice."); Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature*, 49 SANTA CLARA L. REV. 165, 173 (2009) ("Scholars agree . . . that Justice Jackson's tripartite framework is one of the most resilient and workable frameworks to evaluate the constitutionality of executive actions."); Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 187, 202 (Peter Brooks & Paul Gewirtz eds., 1996) ("[The concurrence is] the most truly intellectually satisfying . . . opinion in our two-hundred-year constitutional history."); ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 382 n.18 (1976) (describing Justice Jackson's opinion as "deservedly famous").

category.<sup>53</sup> Yet, in taking the categories at face value, they offer at least tacit approval of Jackson's framework.<sup>54</sup> Because they tend to accept the framework by a simple citation to Jackson's concurrence, their statements add little to the debate. The ones who contest the usefulness of Jackson's categories, different from true believers and agnostics, are an isolated minority.

#### MORE UNFAVORABLE TAKES

Not all scholars, however, are quite so enamored with Jackson's categories. Before me, a few brave voices criticized the three categories and called into question Jackson's exalted status. An early dissenter in the academy was Edward Corwin, who challenged both the majority and concurring decisions in the *Steel Seizure Case*. Corwin concluded that "Justice Jackson's rather desultory opinion contains little that is of direct pertinence to the constitutional issue."<sup>55</sup> Summarizing the concurring opinions, Corwin said they did not "contribute anything to the decision's claim to be regarded seriously as a doctrine of constitutional law."<sup>56</sup> This, in conjunction with his view of the majority opinion as "a purely arbitrary construct created out of hand for the purpose of disposing of this particular case, and . . . altogether devoid of historical verification," led Corwin to predict that "*Youngstown* will probably go down in history as an outstanding example of the *sic volo, sic jubeo*<sup>57</sup> frame of mind into which the Court is occasionally maneuvered by the public context of the case

53. Chemerinsky, best understood, may fall into this category since he does not go out of his way to describe why he favors Jackson's approach over other approaches. In the Teacher's Manual to the third edition of his casebook, he is more candid than elsewhere: "Justice Jackson's tripartite analysis of presidential power is very famous and very frequently cited, but I've never found it terribly helpful."

54. See, e.g., Sapna Desai, *Genocide Funding: The Constitutionality of State Divestment Statutes*, 94 CORNELL L. REV. 669, 702 (2009) (relying upon Jackson's categories in analysis); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 94–96 (2d ed. 1996) (stating that Justice Jackson's concurring opinion in *Youngstown* "has become a starting point for constitutional discussion of concurrent powers."); Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1479 (2009) ("Jackson's three-part framework from his concurrence in *Youngstown* . . . has long been used to assess whether a President's activities in the national security arena are permissible."); Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, n.3 (2009) ("The Supreme Court has embraced Justice Jackson's framework as the grounding structure for review of the President's actions.").

55. Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 63 (1953).

56. *Id.* at 64.

57. Translating to "I want this, I order this." In other words: "arbitrary."

before it.”<sup>58</sup> Although Corwin should be applauded for taking on the Court, it cannot be said more than fifty years later that Jackson’s concurrence has been written off as an arbitrary product with no useful guidance on constitutional law. That prediction Corwin got wrong. Today many people—judges, academics, and others—use Jackson to understand presidential power. The substance of Corwin’s critique, however, is still solid.

Modern commentators who criticize Jackson’s tripartite scheme argue, as I have, that the framework is far too simple. Saby Ghoshray, for example, says that Jackson’s system “would have worked perfectly had the Constitution been of straightforward Newtonian design. Under this framework, the three discrete scenarios of Justice Jackson would neatly fit within the conceptualized framework with its carefully balanced counter forces combating the forces, along the way providing bullet proof checks and balances.”<sup>59</sup> But constitutional law is not so neat. As Ghoshray and many others know, it is rife with “uncertainties and complexities,”<sup>60</sup> “continuously shaping, evolving, and structuring based on the existing circumstances.”<sup>61</sup> In sum, while Jackson’s categories are easy to work with, they are of limited value for understanding a complex, non-linear system with more than three basic patterns.<sup>62</sup> The categories have even less to say about the CIA under Presidents Bush and Obama.

Another criticism of Jackson is that, contrary to assertions from Chemerinsky, Koh, and others, a framework by which Congress can increase and decrease the President’s power through its own action or inaction undermines our system of checks and balances.<sup>63</sup> Martin Redish and Elizabeth Cisar explain:

Justice Jackson’s assumption that the executive branch’s power may be either augmented or decreased by congressional addition or subtraction—a type of congressional additur and remittitur—is valid in the narrow sense that if Congress has exercised its legislative power directing or authorizing implementation or enforcement, the President is expressly obligated by Article II to “execute”

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58. Corwin, *supra* note 55 at 64.

59. Ghoshray, *supra* note 52, at 205.

60. *Id.* at 211.

61. *Id.* at 205–06.

62. *Id.* at 205.

63. Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 485–86 (1991). Redish and Cisar refer to this theory as Jackson’s “cumulative effects theory.” *Id.*

those laws, a power to act that the President would lack in the absence of such legislation. Beyond that limited usage, however, Justice Jackson's "cumulative effects" theory makes neither textual nor theoretical sense.<sup>64</sup>

To the chagrin of Redish and Cisar, Jackson would place a situation in the first category even if the President's power under Article II is questionable but Congress infuses the President with some of its own Article I power.<sup>65</sup> Even if Congress delegated this power voluntarily, "such an approach effectively destroys the 'separation' of branch powers: One branch would be exercising power clearly marked for another branch."<sup>66</sup>

Redish and Cisar acknowledge that "[i]t might be argued . . . that as long as Congress has voluntarily chosen to convey its power to the executive branch (an assumption of Justice Jackson's first category), no separation of powers violation has occurred."<sup>67</sup> Congress, the argument goes, has essentially waived its right to argue that a violation has occurred.<sup>68</sup> In response, Redish and Cisar argue:

But both theoretically and practically, this waiver analysis is unacceptable. From the perspective of American political theory, the concept of congressional waiver ignores the fact that separation of powers protections were not inserted to protect the other branches, but rather to protect the populace. Thus, just as a litigant is not permitted to waive limitations on a court's subject-matter jurisdiction because such limitations are imposed to protect the system rather than the litigant, so too should Congress not be authorized to waive systemic protections of the electorate. From a practical perspective, the waiver theory ignores the obvious possibility that Congress may be controlled by the same party as the executive branch, effectively reducing Congress's check on the President. In such a situation, the only means of assuring the prevention of branch usurpation is by judicial enforcement of separation of powers.<sup>69</sup>

Even if other scholars have forgotten the people, Redish and Cisar remind us that we are the Constitution's ultimate power. Concerning the CIA and many other programs, we have voice in the Preamble, the Tenth Amendment, and in many

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64. *Id.* at 486.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 486–87.

other places. Redish and Cisar, to repeat, are concerned about a situation in which the same political party controls the presidency and Congress. They saw the possibility of a triumvirate—call them Obama, Reid, and Pelosi—which is more important and perhaps more dangerous than Jackson's three categories.

### SPECIFIC PROGRAMS

If metaphor and formula fail to provide a complete picture of executive power under Bush and Obama, one can opt for granular detail from newspapers and magazines. Although Obama promised a clean break with Bush's national security practices, not all that much has changed. On those policies that relate to the CIA, Obama has repackaged Bush/Cheney policies, adding different bows and ribbons around the contents inside. To the dismay of supporters who expected him to be a civil libertarian in all aspects of the fight against terrorists, President Obama has often dealt with suspected terrorists through something other than the criminal justice system's full due-process model. Whether or not Obama uses the rhetoric of war, it is only the laws of armed conflict that explain and justify many of his programs.

### PREDATOR STRIKES

During the presidential campaign, to balance his apparent softness in calling for an American withdrawal from Iraq, Senator Obama signaled that he would be tougher than his Republican opponent in going after terrorists in Afghanistan and Pakistan.<sup>70</sup> This is a promise President Obama has kept. To the human rights community's chagrin, Obama has increased Predator strikes on al-Qaeda and on Taliban targets in Afghanistan and Pakistan.<sup>71</sup>

Although President Obama uses the phrase "war on terror" less than President Bush did, the new President has outdone the

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70. Merle D. Kellerhals, Jr., *Obama Emphasizes Multilateral U.S. Foreign Policymaking*, AMERICA.GOV, Jul. 25, 2008, <http://www.america.gov/st/usg-english/2008/July/20080725162819dmslahrellek0.840069.html> ("In the struggle against international terrorism, Obama said the focus of U.S. security efforts must be Afghanistan and Pakistan, where he says al-Qaida's 'roots run deepest.'").

71. See Jane Mayer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009 at 36 ("During his first nine and a half months in office, [Obama] has authorized as many C.I.A. aerial attacks in Pakistan as George W. Bush did in his final three years in office.").

prior President on this very aggressive program. Whether the Predator strikes come from the Air Force or the CIA, they can only be justified under international law if the United States is in armed conflict or acting in self-defense against the non-state targets. Harold Koh, having left Yale to join the Obama Administration, conceded both these points in a March 2010 address to the American Society of International Law. The criminal justice system does not tolerate this kind of killing.

Predator strikes under Obama have accompanied more American troops on the ground in Afghanistan. The United States, to be sure, is not at war with the governments in either Afghanistan or Pakistan. Both those governments, somewhere between armed conflict and law enforcement, are trying to root out at least some parts of the Taliban and al-Qaeda in their countries. The Afghan Taliban, of course, may not be the same force as the Pakistani Taliban, which explains why the Afghan and Pakistani governments differ in their assessments of the threat from the two groups.

Whether the United States is clearing Predator strikes with the Afghan and Pakistani governments is not clear. The clearances, different from public statements after an attack, may come from the foreign governments through private channels. But if the United States is not seeking any clearance, these strikes are arguably violations of state sovereignty—and international law.

Missile strikes from the sky complicate gunfights on the ground. The pilots who guide the Predators through remote-control should be using multiple sources of intelligence before firing missiles against suspected terrorists. Although some critics have questioned how accurately the pilots distinguish combatants from civilians,<sup>72</sup> very few have directly challenged the legality of what has become “Obama’s war.” Democrats in Congress seem less concerned about possible violations of international law if their White House is committing them. That is another fact of politics.

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72. Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009* 26 (Norte Dame Legal Studies Paper No. 09-43), available at <http://ssrn.com/abstract=1501144> (“The U.S. cannot distinguish between civilians and combatants with the reasonable [certainty] demanded by the principle of distinction. Nor has the U.S. apparently taken the necessary precautions to protect civilian lives.”).

## RENDITION

Fewer than six months into office, President Obama announced that the rendition program would continue.<sup>73</sup> This program, started even before President Bush, involves the transfer of suspected terrorists between jurisdictions without complying with the elaborate procedures of extradition. So, on rendition, Obama has chosen something other than full transparency and accountability for the CIA.

Leon Panetta, toward the end of his confirmation hearing to become Obama's CIA Director, signaled for the new President that rendition would not be closed down.<sup>74</sup> Even before the President's announcement, however, Panetta's signal caused a strong negative reaction from the human rights community.<sup>75</sup> To placate the civil libertarians, President Obama promised more oversight on the rendition program. Obama's State Department may play a larger role in negotiating assurances of proper treatment of suspected terrorists from the receiving countries. And outside observers including the International Committee of the Red Cross may be brought in as monitors after transfer.

The checks and controls on the rendition program come through executive orders and directives, not by statutes. On rendition, President Obama is not interested in tying himself to the mast of any ship. He is not interested in pursuing an idea Vice President Biden proposed back in the Senate: a statute from Congress to bring in a judicial check on renditions. In 2007, Senator Biden proposed the National Security with Justice Act

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73. Press Release, Office of the Press Sec'y, Remarks by the President on National Security, (May 21, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/).

74. See Mark Mazzetti, *Panetta Open to Tougher Methods in Some C.I.A. Interrogation*, N.Y. TIMES, Feb. 6, 2009, at A14, available at <http://www.nytimes.com/2009/02/06/us/politics/06cia.html> ("Mr. Panetta also said the agency would continue the Bush Administration practice of 'rendition' . . . . But he said the agency would refuse to deliver a suspect into the hands of a country known for torture or other actions 'that violate our human values.'"). Earlier in the hearing, CIA Director Panetta stated that the Obama Administration would not continue the program "because, under the executive order issued by the [P]resident, that kind of extraordinary rendition, where we send someone for the purposes of torture or for actions by another country that violate our human values, that has been forbidden by the executive order." *Newshour with Jim Lehrer: CIA Nominee Panetta May Face Overhaul of Counterterrorism Measures* (PBS television broadcast Feb. 5, 2009), available at [http://www.pbs.org/newshour/bb/politics/jan-june09/cia\\_02-05.html](http://www.pbs.org/newshour/bb/politics/jan-june09/cia_02-05.html).

75. See, e.g. Kenneth Roth, *A Letter to CIA Director Panetta Regarding Diplomatic Assurances Policy*, HUMAN RIGHTS WATCH, Feb. 26, 2009, <http://www.hrw.org/en/news/2009/02/26/letter-cia-director-panetta-regarding-diplomatic-assurances-policy> ("We . . . ask that you entirely disavow the practice of rendition to torture, both as it was carried out during the Bush Administration, and as it was carried out in previous years.").



by which the Foreign Intelligence Surveillance Act court would, in secret, review executive determinations about whether a “substantial likelihood” exists for believing the transfer would lead to torture.<sup>76</sup> Perhaps now that a Democrat runs the White House, a check on rendition from the judicial branch is no longer necessary. Or it may be a simple matter of packaging; because Obama is friendlier than Cheney, the American people and the international community may be more willing to accept Obama’s practices on the dark side. For any White House, marketing matters.

### MILITARY COMMISSIONS

President Bush proposed military commissions as an exception to criminal justice for handling the trials of suspected terrorists. President Obama, again to the disappointment of his civil libertarian base, hinted at more stuff from the dark side. In a May 2009 speech, President Obama stated that “whenever feasible, we will try those who have violated American criminal laws . . . . Our courts and our juries, our citizens, are tough enough to convict terrorists. . . . [D]etainees who violate the laws of war . . . are . . . best tried through military commissions.”<sup>77</sup> Now the hints of the “yes-but” rhetoric have become truth.

The Obama Administration will use military commissions, modified and arguably improved from Guantanamo, to handle some terrorists. They have announced that they will use a military commission, for example, on the alleged plotter of the Cole bombing in Yemen, Abd al-Rahim al-Nashiri.<sup>78</sup> On the other hand, Obama’s Justice Department said it would handle the alleged 9/11 plotter, Khalid Sheikh Mohammed (KSM), in federal court in the Southern District of New York.<sup>79</sup> To those

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76. National Security with Justice Act, S. 1876, 110th Cong. § 104(a)(5) (2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:s1876is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1876is.txt.pdf).

77. President Barack Obama, Remarks by the President on National Security (May 21, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/).

78. Charlie Savage, *Trial Without Major Witness Will Test Tribunal System*, N.Y. TIMES, Dec. 1, 2009, at A16, available at [http://www.nytimes.com/2009/12/01/us/01cole.html?\\_r=1](http://www.nytimes.com/2009/12/01/us/01cole.html?_r=1) (“Mr. Nashiri’s case will be the marquee test of a new tribunal system designed to handle terrorism suspects.”).

79. Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1, available at <http://www.nytimes.com/2009/11/14/us/14terror.html> (“The Obama Administration said Friday that it would prosecute Khalid Shaikh Mohammed, the self-described mastermind of the Sept. 11 attacks, in a Manhattan federal courtroom.”).

outside the White House, the rhyme and reason to President Obama's decisions on who gets military justice and who gets civilian justice are not so apparent. Politics are again at play.

Further, and more to the point of executive power, the Obama Administration still relies on the enemy-combatant category to justify military trials and the long-term detention of some suspected terrorists. The Obama Administration, merely changing labels under the Military Commissions Act of 2009, calls these unfortunate souls "unprivileged enemy belligerents." While the Bush Administration defined an "unlawful enemy combatant" as someone who supported the Taliban or al-Qaeda, the Obama Administration has modified its stance in litigation to speak of "substantial" support.<sup>80</sup> Adding an adjective makes a difference on some cases, but, in an area where the President retains ample discretion, the tweaking is not substantial change. For some fronts in Obama's counterterrorism, the framework is far more war than peace. The new Military Commissions Act applies to those non-U.S. citizens who have engaged in "hostilities" against the United States; have "purposely and materially" supported those hostilities; or have joined al-Qaeda.<sup>81</sup> Obama, like Bush, believes that membership in "al-Qaeda" is something that lends itself to meaningful definition.

Worse, President Obama did not make his self-imposed deadline of closing Guantanamo as a detention center within a year. Closing Guantanamo, it seems, is easier said than done. By the time of the presidential transition, George Bush, Barack Obama, and the vanquished candidate, John McCain, all agreed that Guantanamo needed to be closed. The mess, of course, was in the details. Despite Obama's charm and the new-found willingness of countries to help the United States, not all Guantanamo detainees can be transferred from United States control in the snap of fingers. Nor can all those leftover in Guantanamo easily be tried. As to the trial option, the intelligence community knows transparent justice runs counter to protecting legitimate intelligence sources and methods. The

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80. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, Guantanamo Bay Detainee Litigation, Misc. No. 08-442 (TFH) (D.C. Cir. Mar. 13, 2009), *available at* <http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>.

81. Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-1807, 123 Stat. 2574, 2575 (2009), *available at* <http://www.defense.gov/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf> ("The term 'unprivileged enemy belligerent' means an individual . . . who has purposefully and materially supported hostilities against the United States or its coalition partners.").

heads of the various intelligence agencies are reminding President Obama of this. Moreover, transferring suspected terrorists to United States territory is a political gamble. Rahm Emanuel, the President's chief of staff, knows that too.

Again, to the chagrin of civil libertarians, President Obama is considering indefinite detention for those Guantanamo detainees not easily handled by trial. Whether or not President Obama finds the Jackson categories useful, he does not believe he needs any additional support from Congress to justify this detention. The former law professor hints that the AUMF plus his presidential powers already provide him solid ground. So if the trial of either al-Nashiri or KSM somehow results in a not-guilty verdict, the Obama Administration will be tempted to hold them as captured belligerents for the duration of American hostilities with al-Qaeda. That said, if President Obama transfers any Guantanamo leftovers to United States territory, he may actually seek congressional support. Continuing to hold them in Cuba is one thing. Holding them in Illinois is quite another.

#### STATE-SECRETS PRIVILEGE

By this point in the journey it should come as no surprise that President Obama, much like Captain Bush on his own ship, also favors assertions of the state-secrets privilege as another area of robust executive power. Obama's cabinet heads have not shied away from asserting this privilege to protect sensitive military, diplomatic, and intelligence information when the United States is a party to a lawsuit or when the United States intervenes in the lawsuit. The state-secrets privilege is just one of several presidential prerogatives to keep things out of the public spotlight. Other privileges include the right to classify and the executive privilege to protect the confidences of those who advise the President.

The Obama Administration, for example, continues to assert the state-secrets privilege in a case in which a Boeing subsidiary is being sued for its alleged role in the rendition program.<sup>82</sup> In *Jeppesen*, five non-U.S. citizens brought suit under the Alien Tort Statute against Jeppesen Dataplan for providing logistical and other services to the aircraft and the crews the CIA allegedly used in transferring them within the rendition program.<sup>83</sup> A panel of the Ninth Circuit rejected the

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82. See *Mohamed v. Jeppesen Dataplan*, 579 F.3d 943 953–58 (9th Cir. 2009).

83. *Id.* at 951.

government's broad assertion of the state-secrets privilege as to the "very subject matter" of the case, holding that the government needed to conduct an item-by-item inventory of the information to which the privilege applied.<sup>84</sup> The appellate court remanded to the district court for that inventory and for a determination that the objected to evidence was essential to a *prima facie* case.<sup>85</sup> Before the remand, the Ninth Circuit took this case up *en banc* and heard oral arguments in December 2009.<sup>86</sup>

The challenge against Boeing's subsidiary has gone farther than Khaled el-Masri's lawsuit which alleged the CIA wrongfully snatched him in Macedonia and then transferred him to Afghanistan for harsh interrogation. In the Eastern District of Virginia, Judge Ellis accepted the government's broad assertion of the state-secrets privilege in the el-Masri case, and the Fourth Circuit affirmed.<sup>87</sup>

Again, on state secrets President Obama has not sought to involve Congress. Rather than support any congressional bills to reform the privilege, the Obama Administration offered its own reforms through a new Justice Department policy on September 23, 2009.<sup>88</sup> Under this policy, heads of agencies are to assert the privilege only in cases of "significant harm" to national security. This is an executive gloss on the Supreme Court decision, *United States v. Reynolds*,<sup>89</sup> which first recognized the state-secrets privilege. In that case, the head of any executive agency could assert the privilege based on personal review of the facts. The new Obama policy, adding some internal checks, sets up the State Secrets Review Committee to coordinate assertions of the privilege and requires the Attorney General to review all proposed assertions.

President Obama's maneuver on state secrets avoids a difficult constitutional issue. If he and Congress were to pass

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84. *Id.* at 955–58.

85. *Id.* at 962.

86. Bob Egelko, *Torture Suit Too Hot to be Heard, U.S. Says*, S.F. CHRONICLE, Dec. 16, 2009, at C-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/12/16/BA6H1B4L3P.DTL> ("The [Jeppesen] case cannot proceed without getting into state secrets," Justice Department lawyer Douglas Letter told an 11-judge panel of the Ninth U.S. Circuit Court of Appeals in San Francisco.").

87. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007) ("[T]here is no doubt that the state secrets privilege is validly asserted here.").

88. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Establishes New State Secrets Policies and Procedures (Sept. 23, 2009), available at <http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html>.

89. 345 U.S. 1 (1953).

legislation that reformed the state-secrets privilege, they would have to determine the underlying basis to the *Reynolds* decision. If the basis is common law, there is ample room for statutory refinement. But if the basis to the decision is the President's inherent power, there is much less room in what Justice Jackson calls his third category. An amendment to the Constitution would be necessary.

President Obama's approach on state secrets, just as his approach to Predator strikes and renditions, does not seem unreasonable to me. In my view, the use of the state-secrets privilege does not require an overhaul. Between Bush and Obama, the three branches continue to work toward equilibrium in this area of national security law.

#### OTHER DECISIONS

The lack of total transparency about CIA activities disappoints Obama's supporters who expected a radical shift toward open government under the new President. One should be careful, however, not to overstate that everything has stayed the same for the CIA under Obama. Packaging and nuances do matter. And there were even a few victories for civil libertarians.

Civil libertarians must be happy with Obama's new executive orders which say on close calls about classification, executive officials should lean toward disclosure. One order states: "If there is significant doubt about the need to classify information, it shall not be classified."<sup>90</sup> Another order directs disclosure of presidential records unless specific materials are identified which "may raise a substantial question of executive privilege."<sup>91</sup> The revoked Bush executive order, by contrast, instructed executive officials to err toward non-disclosure:

President may assert any constitutionally based privileges . . . [which] subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or

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90. Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

91. See Exec. Order No. 13,489, 74 Fed. Reg. 4,669 (Jan. 21, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-1712.pdf> (titled the pertinent disclosure section as "Notice of Intent to Disclose Presidential Records").

his advisors (the deliberative process privilege).<sup>92</sup>

Plus, Obama seems more willing than Bush to declassify documents. This transparency, of course, relates to abuses and perceived abuses from the prior Administration. Obama, in fact, may be less willing to declassify his own programs. In any event, Obama's supporters must be happy with the level of detail released to the public in the 2005 Office of Legal Counsel memoranda on CIA interrogations and in the 2004 Special Review by the CIA's Inspector General into Counterterrorism Detention and Interrogation Activities (September 2001-October 2003).<sup>93</sup> These reports catalogued the CIA's harsh tactics on suspected terrorists, some approved, some not: cramped boxes with caterpillars, sleep deprivation, waterboarding, cold-celling, stress positions, threats of sexual assault or death of family members, the buzzing of a power drill, cigar smoke, dousing with cold water, and a mock execution. Before this, the Bush Administration had completely withheld the 2005 OLC memos, and presented only a heavily redacted version of the IG report in response to Freedom of Information Act requests. President Obama, by contrast, has shined some light on the dark side.

In another victory for civil libertarians, the Obama Administration decided in February 2009 to transfer Ali Saleh Kahlah al-Marri back to the criminal justice system.<sup>94</sup> At the change in presidential administrations, al-Marri's case was pending in the Supreme Court, waiting for the Government's brief. Before the case reached the high court, al-Marri (a Qatari in legal residence with his family in Peoria, Illinois) was arrested as a "material witness" in the 9/11 investigations. Next, a grand jury charged him with credit card fraud, among other crimes. Then, in a surprise to the public, the Bush Administration

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92. Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001\\_register&docid=fr05no01-104.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=fr05no01-104.pdf) (citing the strong presumption for non-disclosure decided in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977)).

93. Scott Shane & Mark Mazzetti, *Records Show Strict Rules for C.I.A. Interrogations*, N.Y. TIMES, Aug. 26, 2009, at A1, *available at* <http://www.nytimes.com/2009/08/26/us/26prison.html> ("The first news reports this week about hundreds of pages of newly released documents on the C.I.A. program focused on aberrations in the field: threats of execution by handgun or assault by power drill; a prisoner lifted off the ground by his arms, which were tied behind his back; another detainee repeatedly knocked out with pressure applied to the carotid artery.").

94. See Carrie Johnson, *Terrorism Suspect Headed to U.S. Court*, WASH. POST, Feb. 28, 2009, at A02, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR2009022701692.html>.

transferred him to a military brig in Charleston, South Carolina. Under President Bush, the government's explanation for holding al-Marri in a military brig was that he was an enemy combatant feared to be part of an al-Qaeda cell.

Under President Bush, the reason for transferring al-Marri from the criminal justice system to the military brig was not clear. The evidence to prove the criminal case beyond a reasonable doubt may not have been there. Or intelligence sources and methods needed protection. Or indefinite detention was preferred to a fixed sentence. Whatever Bush's reason for the transfer out of the criminal justice system, the Obama Administration negotiated a plea with al-Marri, rather than push the Bush Administration's broad theory of executive power in the case of a person arrested, without a gun, far from a conventional battlefield. Al-Marri was therefore transferred back to the custody of the Attorney General, and his guilty plea mooted an important test of executive power in the Supreme Court.<sup>95</sup>

In al-Marri's case, Obama showed self-control like Odysseus. The plea bargain with al-Marri allowed the Qatari to be removed from our country on the solid pillars of criminal law and immigration law. Although these two pillars also cause concerns for civil libertarians, they are not as controversial as presidential power to hold people for the duration of a long, shadow war.

Obama's retreat on al-Marri leaves the *Hamdi* decision as the Supreme Court's most recent precedent on the President's authority to detain enemy combatants. A plurality of the Court, along with Justice Thomas, agreed that the AUMF passed after 9/11 gave President Bush the authority to detain a United States citizen captured in Afghanistan in late 2001. President Obama did not press any further. A newly constituted Court might have backtracked from *Hamdi*.

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95. Memorandum from President Barack Obama, on Transfer of Detainee to Control of the Att'y Gen. (Feb. 27, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Transfer-of-Detainee-to-Control-of-the-Attorney-General](http://www.whitehouse.gov/the_press_office/Transfer-of-Detainee-to-Control-of-the-Attorney-General) ("Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States, I hereby direct [the Secretary of Defense] to transfer Mr. al-Marri to the control of the Attorney General upon the Attorney General's request."); *Terror Suspect Al-Marri Pleads Guilty*, CBS NEWS, Apr. 30, 2009, <http://www.cbsnews.com/stories/2009/04/30/national/main4981776.shtml> ("Ali al-Marri, 43, admitted to one count of conspiring to provide material support or resources to a foreign terrorist organization.").

Even the author of the *Hamdi* opinion, Justice O'Connor, understood that the foundation to the President's authority concerning an al-Qaeda partisan was not rock solid. "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized," she said.<sup>96</sup> Relying on "longstanding law-of-war principles," she argued that "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."<sup>97</sup> But she acknowledged that her understanding could fall apart "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war."<sup>98</sup>

Al-Marri's case was tougher than Hamdi's. Obama and his advisers saw that. Wiser than Bush, Cheney, Addington, and company, Obama did not push to the point of backfire.

### CONCLUSION

Although Odysseus and the Jackson categories are useful as metaphors, they obscure the basic point that the White House has more power on CIA programs when the President smiles. President Obama—in carrying out an aggressive use of Predator strikes, irregular renditions, military commissions, the state-secrets privilege, and long-term detention—understands this point about the dark side to presidential power. Across the executive branch, Obama's smile has replaced Cheney's scowl.

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96. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

97. *Id.* at 518.

98. *Id.* at 520.